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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 651

GRADY L. RUSHING, AN INDIVIDUAL,
D/B/A MARCEL COMPANY,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

GRADY L. RUSHING, an individual, d/b/a MARCEL COMPANY, hereinafter sometimes referred to as petitioner, prays that a writ of certiorari issue to review the judgment and orders of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on July 10th, 1963, petition for re-hearing being denied on August 29th, 1963.

A

OPINIONS BELOW

The judgment and orders which petitioner seeks to have reviewed are printed in Appendix hereto.

B

JURISDICTIONAL GROUNDS

The judgment and decree of the Court of Appeals was entered on July 10th, 1963. Re-hearing was denied on August 29th, 1963. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., SECTION 1254 (1) and SECTION 2101 (c).

C

QUESTIONS PRESENTED

1. That the findings and conclusions of the Commission are not supported by substantial evidence on the record considered as a whole and are contrary to the evidence.

2. That the decision and order are based upon an erroneous and improper construction and application of the law.

3. That the decision and order are contrary to law, have no rational basis, and are arbitrary, capricious and an abuse of discretion.

4. That, by the exclusion of certain evidence, by refusing to make evidence in its possession available for use by petitioner, and by other acts, the Commission committed prejudicial error.

5. That the decision and order abridge petitioner's rights under the Administrative Procedure Act of 1946, and under the Fifth Amendment to the Constitution of the United States.

6. That the Commission is not expert in the field of education and its decision and order thereon have no rational basis, and are arbitrary, capricious and an abuse of discretion.

7. That the procedure, including investigations of petitioner before filing of complaint constitute violations of petitioner's traditional procedural safeguards.

8. That the Commission has exceeded the authority conferred and failed to apply the legislative standards validly set up.

9. That the Commission is guilty of unclean hands in preparing and prosecuting its complaint.

10. That the order of the Commission is not justified inasmuch as petitioner is not guilty of any violation.

D

PERTINENT CONSTITUTIONAL PROVISIONS & STATUTES

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ADMINISTRATIVE PROCEDURE ACT OF 1946:

5 U.S.C. 1001 *et seq.*

E

STATEMENT OF THE CASE

1.

JURISDICTION

Jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked pursuant to 15 U.S.C. 45 (c).

2.

THE CASE

Petitioner commenced business operations on August 6, 1958, with his principal office and place of business at 8210 Hickory Street, New Orleans, Louisiana, engaging in the sale and distribution of a course of study and instruction which prepares purchasers thereof for Civil Service examinations, which course is pursued by correspondence through the mail.

Initially petitioner had contractual business ties with Claude I. Woolwine, doing business as Universal Training Service. (Tr. pp. 24, *et seq.*) Petitioner's business relationship with Woolwine was terminated in October of 1960. (Tr. pp. 34, *et seq.*) Petitioner employed, by contract, salesmen to sell said course of study and instruction. (RX 52, 53, 54, 55.) In the sale and distribution of said course of study and instruction petitioner exclusively utilizes certain promotional material. (RX 51, 52, 53, 54, 55.)

In the sale and distribution of said course of study and instruction the purchaser thereof enters into a formal written contract, whereby the purchaser agrees to purchase and pursue the course of study for a stipulated price. After a course of study is sold, petitioner, in an effort to collect any balance due and owing by the purchaser, uses collection forms as reflected by CX 109, 110, 111. (Tr. pp. 964, 965.)

On October 12, 1960, the Commission issued a complaint against Woolwine and petitioner, charging violations of the Federal Trade Commission Act, alleging the Commission of unfair and deceptive acts and practices and unfair methods of competition in connection with the sale and distribution of said course of study and instruction.

The Commission and Woolwine actively exchanged information and evidence, which the Commission used against petitioner at the hearing of the complaint against petitioner; however, prior to the action herein, on May 10, 1961, the complaint against Woolwine was severed and the Commission proceeded separately against petitioner. Hearings were conducted by a hearing examiner and on September 29, 1961, an initial decision was issued which concluded as follows:

> "3. The respondent disseminated and caused to be disseminated false advertising in commerce and made and caused to be made false representations in connection with and for the purpose of promoting the sale of and selling of the materials offered by him. Such activity constitutes unfair and deceptive acts and practices in violation of the Federal Trade Commission Act.

"I have given consideration, as above noted, to the fact that transmission or delivery of materials sold by respondent was interrupted because of his controversy with Woolwine and to the fact that respondent has caused to be prepared a complete new set of materials now being offered by him. However, the nature of the representations made, the manner in which respondent always has conducted his business, his emphasis on indiscriminate sales without regard to the good which a purchaser might or could derive from the materials offered by him and his almost complete preoccupation with the collection of money claimed to be due from sales persuade me that the following order is necessary and appropriate."

Thereafter, petitioner appealed from the initial decision to the Federal Trade Commission, which appeal was denied, without hearing, on November 27, 1961:

"It is ordered that respondent's petition, treated as an appeal, be, and it hereby is, denied.

"It is further ordered that the findings, conclusions, and order contained in the initial decision of the hearing examiner be, and they hereby are, adopted by the Commission."

The order directed petitioner-respondent to cease and desist from representing, directly or by implication, that:

"1. Civil Service examinations for particular positions described orally or in any writing have

been announced or are about to be given in or for any geographical or United States Civil Service area unless such examinations actually have been announced or are about to be given in or for such area and adequate time remains for the filing of applications to participate in such examinations.

"2. The completion of any series of materials or course of instruction offered by the respondent in commerce will enable a person to pass the Civil Service examination for the position selected by such person.

"3. Respondent's materials or course of instruction provide training for Civil Service positions.

"4. Persons solicited to purchase respondent's materials or course of instruction are examined or screened as to their possession of qualifications for positions to be sought before they are permitted to purchase such materials or course.

"5. Respondent will continue to train or instruct persons who have completed a purchased series of materials or course of instruction until they are appointed to a Civil Service position. or misrepresenting in any manner the extent or nature of instruction that he gives to purchasers.

"6. Representing directly or by implication:

(a) That purchasers of respondent's materials or course will be notified when or where examinations will be held;

(b) That persons completing said materials or course of instruction and passing a Civil Service examination are assured of or will obtain Civil Service positions; or

(c) That respondent or his agents or representatives are connected with the United States Civil Service Commission or any branch thereof or any other agency of the United States Government.

"7. Using any document that simulates a court process in connection with the collection of accounts from debtors; or using any other document or practice which may suggest or imply that a debtor is being sued when such is not the fact."

Petition was then made to the United States Court of Appeals for the Fifth Circuit to have the Commission's decision and Orders annulled, vacated and set aside.

F

REASONS FOR GRANTING WRIT

That the finding and conclusions of the Commission are not supported by substantial evidence on the record considered as a whole and are contrary to the evidence.

That the decision and order are based upon an erroneous and improper construction and application of the law.

That the decision and order are contrary to law, have no rational basis, and are arbitrary, capricious and an abuse of discretion.

The initial decision of the hearing examiner (Tr. p. 111), which was adopted and upheld by the Commission (Tr. p. 142), does not cite in support of its findings of fact the testimony of any witness other than those urged by the Government in its proposed findings. The initial decision does make reference to CX 114, 115, 117 and 126, which are nothing more than instructions to Marcel's representatives in their sale of its course of instructions. In view of the initial decision's failure to support its findings specifically by reference to the record, it is felt that recitation of the Government's original proposed findings and Marcel's response thereto fully and adequately reveal that the findings and conclusions of the Commission are not supported by substantial evidence, and that the initial decision is based upon an erroneous and improper construction and application of the law, being contrary thereto, having no rational basis, being arbitrary and capricious and constituting an abuse of discretion.

I

First Proposed Finding:

Respondent Grady L. Rushing, an individual doing business as Marcel Company with offices and principal place of business located at 8210 Hickory Street, New Orleans, Louisiana.

Reasons for Proposed Finding:

(Admitted in Answer, Tr. p. 970.)

1. *ON GOVERNMENT'S FIRST PROPOSED FINDING:*

Respondent accepts this finding.

II

Second Proposed Finding:

Respondent is now and for more than one year last past has been engaged in the sale and distribution of a course of study and instruction purporting to prepare purchasers thereof for United States Civil Service examinations and positions with the United States Government, which said course is pursued by correspondence through the United States mails.

There has been at all times mentioned herein a substantial course of trade in said course of instruction sold and distributed by respondent in commerce as "commerce" is defined in the Federal Trade Commission Act.

Reasons for Proposed Finding:

(Tr. p. 971, CX 131.)

2. *ON GOVERNMENT'S SECOND PROPOSED FINDING:*

Respondent has no objection to most of this finding; however, he does reject this finding insofar as it seeks to establish that Marcel Company prepares, or attempts to prepare in any way persons for **positions with the United States.**

ON GOVERNMENT'S REASONS:

Tr. p. 971, *l. 12 clearly defines Marcel operation and does not support the above: Rushing: "We sell a correspondence course to people to teach people how to take a civil service examination by mail."*

CX 131 *is simply financial statement of Marcel Company covering period May 15-26, 1961.*

Therefore, the Government has given no reason to justify that portion of this finding objected to by respondent.

III

Third Proposed Finding:

In connection with the sale of said course of instruction in the several States in which said course is sold by Marcel Company, it causes advertisements to be placed in newpapers and other periodicals, soliciting prospective students. Respondent further solicits students through the use of radio advertisements.

Reasons for Proposed Finding:

See Commission Exhibits 47, 65, Tr. 536 and respondent's Exhibit 51, for examples of advertising and Commission Exhibits 43 and 45 for examples of radio solicitation. Also CX 89 A, B and 90 A, B.

3. *ON GOVERNMENT'S THIRD PROPOSED FINDING:*

Respondent accepts this finding, but addresses objection to reasons in support thereof and other related proposed findings and reasons.

ON GOVERNMENT'S REASONS:

The form of newspaper advertisement which is in use, and has been for sometime, is of Record as **RX 51**, *Tr. p. 828.*

IV.

Fourth Proposed Finding:

In connection with the sale of said course of instruction Marcel Company used and uses a brochure together with other material including the "Enrollment Agreement" or "contract" as it is referred to in soliciting the sale of said course.

Reasons for Proposed Finding:

CX 8, CX 88. There are numerous copies of the contract in the record, the first in the order of receipt in CX 9, which is typical of the others.

4. *ON GOVERNMENT'S FOURTH PROPOSED FINDING:*

Respondent accepts this finding, but addresses objection to reasons in support thereof and other related proposed findings and reasons.

ON GOVERNMENT'S REASONS:

The opportunity Sheet Bulletin or brochure used by Marcel salesmen since September, 1960, is of record as **RX 54** *and* **CX 6**, *which are identical. Tr. pp. 132, 828, 846. (See Appendix A).*

The student-customer contract form which has been in use since September, 1960, is of record as **RX 57**, *Tr. p. 880. See identical form CX 49 and RX 14. (See Appendix A).*

Therefore, CX 8, CX 88 and CX 9 are not typical. *The sales presentation or canned pitch used by Marcel salesmen has not varied and is of record as* **RX 53.** *(Tr. pp. 828, 868, 890, 898.)*

V

Fifth Proposed Finding:

Through the statements appearing in the advertising material, brochure, contract and other promotional material respondents have represented and are representing directly or by implication that:

1. Civil Service Examinations are imminent for all of the positions listed in the brochure in the areas in which advertisements are circulated.

2. The completion of the course of instruction offered by respondents will enable the person to pass the Civil Service Examination for the job selected.

3. This school trains the applicant for the position or positions he selects.

4. Courses are sold only to those qualified for the positions selected.

5. The starting salary for the position listed are those set out in the brochure and other materials.

6. The respondents will continue to instruct persons who have completed said course of instruction until they are appointed to a Civil Service position.

Reasons for Proposed Finding:

1. In CX 8, respondent represents that: "Whichever job you pick, we will coach you for it successfully * * *."

One page two of CX 8 under the caption "OPPORTUNITIES TODAY" it is stated, "Now is the most opportune time to start preparing for a Civil Service position. Written examinations will be held for many permanent Civil Service Jobs, and both veterans and non-veterans will be eligible for appointment."

On the reverse side of the contracts under the heading "II Special Studies" it is stated: "**If**, upon completion of your course and taking your first Civil Service examinations, **you do not** receive a passing grade, or do not **receive an appointment within six months** after the completion of your course, you will receive additional preparatory material * * *." (Emphasis added).

Certainly, in the light of the language in the documents referred to above; the advertisements placed in local newspapers, such as, CX 47 and RX 51, and of course the salesman's pitch, the idea is firmly implanted in the prospect's mind that not only are examinations about to be held, but a position in the Civil Service is a sure thing.

2. The representation relative to the certainty of passing a Civil Service examination for the job selected, after completing the course, is particularly deceptive.

See CX 30 "**Opportunity, News**". This bulletin describes in glowing terms the benefits of Civil Service employment, and the hardship of other persons not under Civil Service when their income is inadequate to meet their

family expenses. This bulletin or brochure also lists many positions indicating that the prospect may select any one he wishes and that the respondent will prepare him for the position selected.

Reference should also be made to the second section entitled "Special Studies," on the back of the contracts (Sec. CX 15). Here the respondent promises that if the student fails to get a Civil Service position in six months he will continue the course with further instructions.

3. In the brochure the prospective student is told to select two or three positions that interest him. The contract form provides for a designation of as many as four types of employment. Obviously, the intended impression on the prospect is that special training for each job selected will be made available.

The impact of this particular representation is emphasized by the salesman when he calls on the prospect. This will be spelled out below in the discussion of the testimony of the witnesses.

4. In CX 30 "Opportunity News" the prospect is instructed to choose two or three jobs that appeal to him and that the "counsellor" (actually a high pressure salesman) will discuss the qualifications and let the prospect know whether he will qualify for such positions.

Note: The last two paragraphs on page one of CX 30.

Reference should also be made to the testimony of Helene Roundtree who was not a citizen of the United States when the agent sold her the course. Tr. p. 616, et seq.

See also CX 99A.

The testimony of John H. Patton and Mrs. Robert Patton.

See also the bulletins sent to the salesmen in the field. CX 114-130.

5. The brochure, CX 30, at page three, lists numerous positions suggesting qualifications as to age and education; and indicating the "G. S." grade, entrance salary, amount of periodic salary increases and maximum basic salary, for each such position.

6. Appearing on the face of the contracts, See CX 9 and CX 50, which were signed by witnesses who testified in this record, is the inscription **"Training Until Appointed."**

This together with the inscription on the backs of some of the contracts *i.e.* 51 under the caption **"Special Studies"** leads the prospect to believe that he will receive training until he actually passes a Civil Service test and obtains an appointment.

5. *ON GOVERNMENT'S FIFTH PROPOSED FINDING:*

Respondent rejects this finding, including its paragraphs 1-6, and his objections are addressed to the reasons in support of this finding and other related proposed findings and reasons.

ON GOVERNMENT'S REASONS:

(1). The exhibits cited by Government, as pointed out above, are not typical. This, notwithstanding, it is submitted that the exhibits cited by Government do not support this proposed finding. A candid reading thereof

each as a whole, shows that each does not represent or tend to represent anything other than the existence of a Civil Service System with a fair description thereof with the reasonable and fair presumption that vacancies will occur in all fields of that system from time to time and that examinations will be held to fill vacancies which occur. In conjunction see: Tr. pp. 79-175, CX 3, 4, 5, 7.

(2). Government cites CX 30 which is not typical. Compare CX 8 and CX 30 which are identical. CX 15 is, likewise, not typical. (See paragraph four (4) above with Appendix A.) This notwithstanding, it is submitted that these exhibits do not support this proposed finding. A candid reading of each, as a whole, shows it does not represent or tend to represent other than by taking the Marcel course a person will be better prepared to stand a certain civil service examination.

(3). Government cites no evidence or authority for this proposed finding other than by reference and such does not support such a finding. A candid reading of any referenced reasons shows that no representation or tendency to represent exists other than to train an applicant for a certain civil service examination.

(4). Government cites no pertinent evidence or authority to support this proposed finding. CX 30, as pointed out, is not typical.

For Roundtree, Tr. p. 616, see: Appendix B, Witness 13.

CX 99-A is a response received from Donaldson in reply to the damaging correspondence, RX 25, 26A, 26B, posted by Government. Tr. pp. 922-923, Tr. p. 918.

For Donaldson, see: Appendix B, Witness 3.

Testimony of Patton: See Appendix B, Witness 10.

In direct contradiction to Government's reasons are RX 75A-75L and Tr. pp. 1045-1046, which negative such a proposed finding.

(5). CX 30, as previously mentioned, is not typical and is the only reason Government sets forth in support of this proposed finding. It is submitted such does not justify such finding.

(6). Government cites CX 9, 50 and 51, which are not typical. Tr. pp. 1022-1023. (See paragraph four (4) above with Appendix A).

VI

Sixth Proposed Finding:

The representations set out in the previous finding are false, misleading and deceptive:

1. Civil Service Examinations had not been announced for many of the positions listed in the brochure in many of the areas in which said advertisements were circulated.

2. The completion of the course of instruction offered by respondent by a purchaser of said course of instruction would not necessarily prepare him sufficiently to pass Civil Service Examination.

3. Respondents have only one course and it does not train persons for any particular position.

4. Respondents in selling the course have no requirement that any qualifications be met other than subscribing and paying for the course.

5. The salaries indicated are not the starting salaries for the positions listed.

6. Respondents do not continue to instruct those who have completed the course of instruction until they have been appointed to a Civil Service position.

Reasons for Sixth Proposed Finding:

1. & 2. See testimony of Maurice A. Brooks. Tr. pp. 79-175, Tr. p. 565.

3. CX 53, Tr. p. 302, *et seq.*

4. RX 73, CX 113, CX 112 A, B, Tr. p. 562, *et seq.* CX 68

5. CX 45, CX 8, CX 88, CX 4. Tr. p. 92.

6. Ida Marie Francis completed the course but received no further lessons. Tr. p. 178 *et seq.*

6. *ON GOVERNMENT'S SIXTH PROPOSED FINDING:*

Respondent rejects this finding, including its paragraphs 1-6, and his objections are addressed to the reasons in support of this finding and other related findings and reasons.

ON GOVERNMENT'S REASONS:

(1 & 2). Testimony Morris A. Brooks, Tr. pp. 79-195, it is submitted does not support these findings. It directs a finding to the contrary. (See Paragraph 5 (1).

Brooks had never taken the Marcel courses which are of record as RX 47, 48, 49, 50. Mrs. Ethel H. Hills, who mainly formulated these courses gave full testimony in respect thereto. Tr. pp. 763-825. These courses are generally described. Tr. pp. 764-765. Even background material, much of which was government publications on the taking of civil service examinations, was offered and received, all of which establishes the substantiality of these courses. RX 39, 40, 41, 42, 43, 45, 46.

These courses, designed to teach people how to take civil service examinations, speak for themselves and should, therefore, be the proper subject for judgment.

These courses, as formulated, are capable of meeting the test. Government has made no attack thereon.

With respect to Gremillion, Tr. p. 565, see: Appendix B, witness 5.

(3). In support of this proposed finding Government cites CX 53 and Caldwell, Tr. p. 302 et seq. CX 53 are some lesson assignments of Marcel received by Kidder. They do not fully represent Marcel courses and are incomplete. Tr. pp. 407, 408, L. 14-16.

Caldwell, Tr. p. 302, et seq. see: Appendix B, witness 2.

RX 47, 48, 49 and 50, Marcel's courses, demand rejection of this proposed finding.

(4). In support of this proposed finding Government cites RX 73, an undisclosed complaint of Norris, (see Appendix B, witness 8).

CX 113 A reply of Marcel Company for payment.

CX 112 A & B letter from Mrs. Robert Patton (see Appendix B, witness 10).

Gremillion, Tr. p. 562. (See Appendix B, witness 5. CX 68 Gremillion Student Contract.

The above are insufficient reasons for justifying the adoption of such a proposed finding. (In direct contradiction see: RX 75 A-L, Tr. pp. 1045-1046).

(5). Government cites, in support of this proposed finding:

CX 45 Radio script of Radio Station WJBW, New Orleans, dated July 9th, 1959. The language used therein does not convey any representation other than it is possible for some persons to start under Civil Service at a certain salary. The Radio script, taken as a whole, does not justify such proposed finding. CX 8 and CX 88, which, as stated above, are not typical. These exhibits, taken as a whole, do not justify such proposed finding. CX 4 is a salary schedule for the Postal Service. See Tr. p. 108, which, in summation, reveals Postal Clerks are appointed from substitute clerks. "The initial compensation is $2.16 per hour." Tr. p. 108, L. 19. Therefore, $2.16 per hour for a forty hour week per annum is $4,492.80. This figure is in full accord with CX 8 and CX 88 for Post Office Clerk. (See schedules listed on CX 8 and CX 88 and Notes 1 thereon containing statements that information is believed to be correct, etc.). Tr. p. 92 is simply Brooks' testimony in general from which Respondent makes specific reference to above. Tr. p. 108.

(6). Government cites the following in support of this proposed finding:

Ida Marie Francis, Tr. p. 178; In substance this witness selected training to prepare for the Civil Service

examination U. S. Clerk CX 9. She finished course. Tr. p. 186. Took the Civil Service examination for U. S. Clerk and passed, Tr. p. 190, and still owes Marcel Company $129.50. Tr. p. 197. Her contract dated 12 January, 1959, called for a payment of $15.00 per month starting 12 February, 1959. CX 9.

This reason clearly gives no support for this proposed finding.

VII

Seventh Proposed Finding:

Marcel Company and its sales agents and representatives have orally stated, represented and implied to prospective purchasers of said course of instruction that:

1. Purchasers of said course will be notified when and where examinations will be held.

2. The purchaser of said course will be trained specifically for the position or positions he selects.

3. Persons completing the course and passing the Civil Service examination are assured of obtaining a United States Civil Service position.

4. Respondent, his agents and representatives are connected with the United States Civil Service Commission or branches thereof or some other agency of the United States.

Reasons for Proposed Finding:

1. Tr. p. 301.

2. Tr. p. 397. Tr. p. 204. Tr. p. 246. Tr. p. 618.

3. Tr. pp. 278, 338, 339, 397, 398.

4. Tr. pp. 275, 279, 302, 618 CX 47.

7. *ON GOVERNMENT'S SEVENTH PROPOSED FINDING:*

Respondent rejects this finding, including its paragraphs 1-4 and his objections are addressed to the reasons in support of this finding and other related proposed findings and reasons.

ON GOVERNMENT'S REASONS:

The only documentary evidence cited in support of this proposed finding is CX 47, which does not import that Respondent is connected with the United States Civil Service Commission or branches thereof or some other agency of the United States.

The testimony of Caldwell, Kidder, Prine, Roberts, Roundtree, Lirette, McNeal are further used in support of this proposed finding.

Respondent has prepared a table (Appendix B), which includes a break-down of these witnesses' testimony, as well as all other witnesses the testimony of which the Government has used in support of its proposed findings, as well as those made reference to through exhibits. It is submitted Appendix B speaks for itself and is full, adequate and valid objection to these reasons cited by Government in support of this proposed finding.

VIII

Eighth Proposed Finding:

Respondent in the course and conduct of his business, in an effort to enforce collection of claims arising out of the agreements entered into with the purchaser of the

said course of instruction has devised and used a series of forms which have the capacity to mislead purchasers into the mistaken belief that they were being sued for the outstanding balances allegedly due on their accounts and caused such purchasers in their mistaken belief to pay such amounts.

Reasons for Eighth Proposed Finding

Admitted in answer.

CX 81.

8. *ON GOVERNMENT'S EIGHTH PROPOSED FINDING:*

Respondent accepts that part of this finding that in the course of his business, in an effort to enforce collection of claims arising out of the agreements entered into with purchasers of courses of instruction he uses certain forms, however, he rejects all other parts of this proposed finding and addresses his objections to reasons in support thereof.

ON GOVERNMENT'S REASONS:

In respondent's original answer herein to Paragraph 8 of Government's complaint, it was admitted that the form marked EXHIBIT A-1 and A-2, attached to the complaint, was as of that date in use. **No further admissions were made.** *(See: Respondent's original answer paragraph 8).*

The forms for collection which have been in use from at least December, 1960, are of record as RX 109, 110, 111. Tr. p. 964. Notices characterized by CX 23, 27, 81, 107-D are not in use. Tr. p. 962, 963 & 967. This, not-

withstanding, it is submitted that the two reasons cited do not support this finding.

CX 81, when admitted into evidence, bore no testimony for such a finding. Tr. pp. 626-627—no belief was entertained whatsoever.

CX 12-B (Exhibit A-1 and A-2 of the complaint) at its being received into evidence definitely established the contrary. Tr. pp. 192-193.

9. *GOVERNMENT'S FAILURE TO SUPPORT ITS COMPLAINT.*

The Government has failed to carry its burden of proof and provide sufficient and/or substantial evidence in support of its complaint.

The frame work of the complaint should here be particularly noticed.

Respondent offers Appendix B hereto to emphasize this point.

The government filed its complaint and has prosecuted it on little more than presumption.

It is realized that the Courts have held that the Federal Trade Commission is specially endowed to consider and pass judgment on a matter such as this, but the testimony of an expert in the field should be considered. (See paragraph 10 below).

The charges involve documentary evidence which to be proven must necessarily demand testimony of witnesses to give live interpretation in line with what government hopes will be substantial evidence to support its complaint. This is fatally absent.

The government cannot prove its case by constructively adding that which it has not provided. An abstract

purchasing public cannot be supplied by government to take the place of or add to the testimony government has presented through the actual purchasing public represented by its witnesses. This is especially true when testimony it has presented is colored and vulnerable to an attack or subject to its serious explanation otherwise, considering its motivation. (See Appendix B). The doctrines of equity, it is submitted, govern.

Government has had ample opportunity to provide sufficient substantial evidence especially considering the circulation of RX 25, 26A and 26B to every witness who testified at its instance, the activities of Marcel's competitor in circulating to the purchasing public RX 21A, 21B, 27A, 27B and 27C.

Respondent re-urges his motion to dismiss upon the grounds therein stated, supplemented by this reply.

10. *MARCEL COMPANY'S PAST BUSINESS OPERATION:*

A full and complete disclosure of Marcel's operation prior to September, 1960, has been presented in the record. Directly bearing thereupon is the testimony of Benjamin M. Klekner, Executive Director for the Association of Home Study Schools, who was accepted as an expert in the field of Respondent's business. Tr. pp. 929-930 This expert testimony imparted the following: Marcel Company is and has been a member of the Association of Home Study Schools since 1959. Tr. p. 931. Marcel and its operation was thoroughly screened for admittance and surveillance continues. Tr. p. 932.

The only complaint received against Marcel was from a competitor, Universal Training Service (Woolwine), not a member of the Association, because of cer-

tain reasons. Tr. p. 933. The Association has a Code of Ethics which it requires member schools to adhere to. Tr. pp. 932, 952, 953. Marcel's courses were approved by the Association. Tr. p. 938. Information requested by the Association of the Federal Trade Commission is not given. Tr. p. 949. This witness also gave off of the record comments on opinions on material which Marcel had used. Tr. p. 935 *et seq.* It is submitted that Marcel enjoys the respect of its competitors in the trade and, in particular, the Association of Home Study Schools.

11. *MARCEL COMPANY'S PRESENT BUSINESS OPERATIONS:*

A full and sincere disclosure of Marcel's present operation has been presented in the record. All phases of the business were presented through respondent and his employees without reluctance or even cautiousness.

Appendix A briefly summarizes the operation making reference to the materials used by Marcel in the sale of its courses.

It is submitted that regardless of Government's contention that certain past practices of respondent were within the inhibition of the Federal Trade Commission Act, which respondent denies, the present operation as reflected in this record does not come within the purview inasmuch as those practices complained of have been discontinued.

Respondent submits that if this be the case, considering the large nature of his business, any adverse order would be cruel and harsh action, especially in view of the complications Marcel Company has encountered with Claude I. Woolwine, trading as Universal Training Service, et al., all of which is amply of record herein.

For this purpose Respondent reiterates paragraphs nine (9) and ten (10) of his proposed Findings of Fact filed herein on August 15th, 1961. **See in particular Government's contact with Woolwine**, Tr. p. 518, L. 24, Tr. p. 519, L. 2-4.

12. *RESPONDENT'S ATTITUDE:*

Respondent's attitude and frame of mind with respect to Marcel's business operation, the trade, the Post Office Department and the Federal Trade Commission has bearing herein.

From commencement of Marcel operations on August 6th, 1958, Tr. p. 971, Respondent's attitude in his business, and as reflected by the record, has been one of sincerity and genuine good interest to his trade. This is the reason for his continued success. See Tr. p. 971, *et. seq.*, showing complete cooperation with the Postal Authorities, as well as representatives of the Federal Trade Commission. This attitude, it is submitted, is best brought out by respondent's demeanor during the course of hearing. The record discloses not attempted concealment of Marcel operations from August, 1958, but rather a frank and forthright effort to disclose fully to the trade, the Post Office Department and the Federal Trade Commission all activities. Tr. pp. 975-985; RX 67, 68, 69, 70; CRX 62, 63, 64, 65, 66 were not received in evidence. Tr. p. 982); RX 71.

Evidence was sought unsuccessfully from Postal Authorities for corroboration. RX 78, Tr. p. 1056.

Respondent's attitude, taken alone, is certainly no defense to any complaint; however, it has bearing here considering the nature of Marcel's business, the develop-

ment and prosecution of Government's complaint and the charges directed by one of Marcel's competitors.

It is submitted such is proper for consideration in equity.

MARCEL COMPANY OPERATIONS

Salesman Contract (Salesmen):

The sales presentation or "canned pitch" used by varied and its form is of record as **RX 52.** See also: Tr. See also Tr. p. 829, Tr. p. 868, Tr. p. 890, Tr. p. 898.

Sales Presentation (Salesmen):

The sales presentation or "canned pitch" used by Marcel salesmen has not varied and is of record as **RX 53.** See also Tr. p. 829, Tr. p. 868, Tr. p. 890, Tr. p. 898.

Weekly Bulletin (Salesmen):

Weekly bulletins, written pep talks or fourteen (14) point bulletins (all descriptive of the same communication) are sent to salesmen in the field by Marcel. See **RX 55,** Tr. pp. 828-829, Tr. p. 868.

Advertisement (Student):

The form of newspaper advertisement is of record as **RX 51.** See also Tr. p. 828.

Student Enrollment (Student):

The student-customer contract form which has been in use since September, 1960, is of record as **RX 57.** See also Tr. p. 880, RX 14 and CX 49.

The present contract form contains no mention or reference to Claude I. Woolwine; Universal Training Service, Inc., 150 Powell Street, Suite 205, San Francisco 2, California; Instruction Department, 150 Powell Street, San Francisco 2, California; or Instructional Dept., 150 Powell St., Suite 205, San Francisco, California.

Marcel's relationship with the Woolwine Company terminated in September of 1960, Tr. p. 985, and two previous agreements had contained reference to the Woolwine Company. When Marcel started business in August, 1958, contract form characterized by CX-9, 25, 50, 72 and 73 was used. From December 1st, 1959, until September, 1960, contract form characterized by CX 15, 19, 51 and 68 was used.

Opportunity Sheet Bulletin (Student):

The Opportunity Sheet Bulletin used by Marcel salesmen since September, 1960, is of record as **RX 54 and CX 6** which are identical. See also Tr. p. 132, Tr. p. 828, Tr. p. 846.

When Marcel started business in August, 1958, "Opportunity News" was used by its salesmen. This is of record as CX 8 and CX 30. From December, 1959, until September, 1960, "Civil Service Opportunities," CX 88, was used. See also Tr. p. 846, Tr. pp. 911-912.

Marcel's relationship with Woolwine and Universal terminated in September of 1960. Tr. p. 985.

Marcel Company Courses (Student):

The correspondence courses of Marcel Company are of record. **RX 47, 48, 49 and 50.** Mrs. Ethel H. Hills, who mainly formulated these courses, gave full testimony in

respect thereto. Tr. pp. 763-825. These courses are generally described by Mrs. Hills. Tr. pp. 764-765. Even background material was offered and received to show substantiality. RX 39, 40, 41, 42, 43, 45 and 46.

Collection Notices:

The forms of collection notices which have been in use for some time are of record as RX 109, 110, 111. Tr. p. 964. Notices characterized by CX 23, 27 and 107D are not in use. Tr. pp. 962, 963 and 967.

ANALYSIS OF COMMISSION WITNESSES

Student and Signed Contract	Pay Status	Complaint	Course Status	Understood Marcel Was School
1. Herbert B. Beverly CX 50	Completed payments Tr. p. 357	Never communicated with Marcel Co. Tr. pp. 358-359	Didn't complete. Tr. p. 358, kept receiving lessons. Tr. p. 359	Yes. Tr. p. 357
2. Mildred Caldwell RX 72	Completed payment Tr. p. 302	Never made complaint to anyone. Tr. pp. 318-321, Request handled. Tr. pp. 990-1	Completed course Tr. p. 311	Yes Tr. p. 309 Tr. p. 322
3. Mrs. James L. Donaldson—CX 59	Completed payment Tr. p. 511	Never made complaint Tr. p. 510	Didn't complete. Tr. p. 510. Abandoned course.	Yes Tr. p. 513, L. 12 et seq.
4. Ida Marie Francis CX 9	Owes Marcel $129.50 Tr. p. 197	Communication handled Tr. p. 190	Completed course and passed U. S. Civil Service Examination.	Yes. Tr. p. 186
5. Jerome P. Gremillion CX 68	Owes Marcel $129.50 Tr. p. 568	Only complaint handled Tr. pp. 1007-1008	Couldn't complete, abandoned. Tr. p. 567	Read contract thoroughly: Tr. pp. 572-573
6. Eldridge Kidder CX 31	Owes Marcel $44.50 Tr. p. 399	Never made complaint to Marcel Co. Tr. p. 419	Course uncompleted Tr. p. 400	Yes Tr. p. 401, L. 14
7. Mrs. Henry Lirette CX 25 RX 11	Owes Marcel $184.50 Tr. pp. 282, 288-289.	Complaint made other than Marcel Co. Tr. p. 283	Course uncompleted. Received lessons. Tr. pp. 280 and 290	Yes—signed contract Tr. p. 287; Tr. p. 278 and 279, L. 19
8. Edmond L. Norris CX 66	Owes Marcel $129.50 Tr. pp. 541, 543	Made no complaint to Marcel Co. Tr. pp. 548-549	Course uncompleted, did not send 1st lesson in. Tr. p. 549	Signed and read contract Tr. pp. 543-548, and understood. Tr. p. 548.

Student and Signed Contract	Pay Status	Complaint	Course Status	Understood Marcel Was School
9. Lorraine McNeal CX 49	Paid $5 down. Course cancelled. $5 refund. Ed. Tr. p. 345.	Complaint handled Tr. pp. 992-994 Course cancelled	Course uncompleted. Received first lesson. Tr. p. 342	Didn't understand Tr. pp. 343, 344
10. John H. Patton RX 14	Paid in full Tr. p. 385	Complaint Tr. pp. 997-1001	Uncompleted due to illness. Tr. p. 388, L. 17	Yes—Tr. pp. 370-374 Tr. p. 390,
11. Lonnie Prine CX 15	Owes Marcel, $124.50. Paid $75.00. Tr. pp. 209, 214	Turned over to his attorney but has never heard from it. Tr. pp. 211-213.	Uncompleted Tr. p. 210	Signed Contract CX 15
12. Jonnie D. Roberts CX 10	Owes Marcel Tr. p. 249	No communications apparent	Uncompleted Tr. p. 249	Signed contract. Tr. p. 246. See Tr. p. 255, L. 19-22
13. Helene Roundtree CX 73	Owes Marcel $199.50 Tr. pp. 624, 625	Marcel requested only installment payments. Tr. p. 623; Tr. pp. 1011-1012	Uncompleted; Received first lesson. Tr. p. 623	Signed contract Tr. p. 620

None of the Government's witnesses who were students enrolled in the Marcel Company's course of study could have, under the facts presented by the Government and their own testimony, freed themselves of their obligations under their executed contracts, which included not only their duty to pursue the course with diligence but, as well, to pay the price as stipulated.

This has long been recognized by the Court of the State of Louisiana. *LaSalle Extension University v. Thibodaux*, 155 So. 53. *Vead v. Rushing, D/B/A Marcel Company*, decided September 17th, 1962, number 737, Court of Appeal, Fourth Circuit, State of Louisiana, ——— So. (2d) ———. In the latter case plaintiff sought to recover the full stipulated price of $199.50 under a written contract pursuant to which he was to receive the correspondence course made subject of the Commission's complaint at issue herein, predicating his prayer for recovery on the following allegations:

> "(1) In forwarding only one lesson the defendant failed to perform his obligation under the contract;
>
> (2) Defendant's agent misrepresented the contract to plaintiff at the time of the signing thereof; and
>
> (3) the deceptively legal and judicial appearing form used in collecting the balance of $189.50 was illegal and constituted a practice condemned by the law."

The Court held:

> "We are unable to agree with the contention. The record reveals quite clearly that plaintiff not only refused to continue the correspondence course but actually refused to prepare even the first lesson and had no desire to receive, and no intention to study, any further lessons. Under these circumstances it would have been a vain and useless thing for the defendant to forward additional lessons. Nor does the record, which consists of the testimony of only two witnesses, reveal any misrepresentation whatsoever on the part of the defendant's agent."

Out of the thirteen (13) student witnesses relied upon by the Commission eleven (11) thereof fall into the above category and had they brought suit in the State Court for the recovery of any monies paid, such would have been rejected, and in the converse, should Marcel Company bring suit for the contract price of the course of study it would be able to enforce payment of all sums due under the contract.

Cream Wipt Food Products Co. v. Federal Security Administration, C. A. 3—March 21, 1951. 187 F. (2d) 789.

Universal Camera Corporation v. National Labor Relations Board, 71 S. Ct. 456.

That, by exclusion of certain evidence, by refusing to make evidence in its possession available for use by petitioner, and by other acts, the Commission committed prejudicial error.

That the decision and order abridge petitioner's rights under law and under the Fifth Amendment to the Constitution of the United States.

That the Commission is not expert in the field of education and its decision and order thereon have no rational basis, and are arbitrary, capricious, and an abuse of discretion.

That the procedure, including investigations of petitioner before filing of complaint, constitute violations of petitioner's traditional procedural safeguards.

That the Commission has exceeded the authority conferred and failed to apply the legislative standards validly set up.

That the Commission is guilty of unclean hands in preparing and prosecuting its complaint.

That the order of the Commission is not justified inasmuch as petitioner is not guilty of any violation.

The Commission's complaint against petitioner was filed in Washington, D. C. on October 12th, 1960, and hearing thereon was fixed for December 19th, 1960, at New Orleans, Louisiana.

Prior to the filing of the complaint petitioner's competitor, Woolwine, extensively circulated and distributed throughout the trade damaging materials accusing petitioner of certain practices. (RX 21A, 21B, 27A, 27B, 27C, See also Tr. p. 34 (Ex. C).

As is reflected by the record many of the Commission's witnesses who testified received this material well in advance of hearing and before the filing of the complaint. All of the student witnesses who testified for the Commission received respondent's exhibits 25, 26A and 26B. (See Tr. pp. 918, 919). Therefore, most of the witnesses appearing for the Commission had been con-

tacted once by petitioner's competitor, Woolwine, and then, strangely enough, were contacted again by Commission investigators in person and through the mails, using the damaging prejudicial news release of the Commission (RX 25, 26A and 26B). Typical of the prejudicial effect brought about by the schooling of witness activities by the Commission is the testimony of Joseph Paul Grizzaffi, (Tr. p. 712 *et seq.*), an employee of Gulf Oil Corporation, a College graduate with a Bachelor of Science Degree and a Commissioned Officer in the Army Reserve. It is pertinent to quote from his testimony, starting at Tr. pp. 716-718:

> "A. I don't remember the month—I believe it was around October or November or December, somewhere in there, but I read in an article in the paper stating the president of the company, I believe it was, Grady Rushing, and I believe the representatives had been in violation of the Federal Civil Service—I don't quite recall how it went but—the course was fraudulent. That's what it amounted to, and they said, the top of this contract, so forth, several people had made certain payments, partial payments, they had to make more payments, and I believe they received letters stating that they had to comply with the contract, or pay the rest of the money, or something like that, and when I found out about the course being fraudulent, I believe that's why I didn't get it.
>
> Q. Did you pay for your course?
> A. Yes, I did, in one payment.
>
> Q. You paid it in one payment?
> A. Yes.

Q. How much did you pay?
A. $175.

Q. To whom did you pay that money, that $175?
A. That was to the representative, Doyle Kelley.

Q. Did Mr. Kelley, let's see . . .

MR. MIDDLETON:

I have no further questions.

CROSS EXAMINATION

BY MR. JACKSON:

Q. Mr. Grizzaffi, that Commission Exhibit 67 that you are holding in your hand?
A. Yes, Sir.

Q. That is your signature on that particular document?
A. That is correct.

Q. Is that your mother's signature below?
A. That's right.

Q. Now, did you read the contract before you signed it?
A. Yes, I did.

Q. Did you read both the front and the back?
A. Yes.

Q. Did she read it?
A. Yes, she did.

Q. At the time that you read the news article that you testified about, Grady Rushing and Marcel Company having been guilty of misrepresentation, at that time you thought he had

already been tried and declared in misrepresentation, fraud?

A. No. The way the article stated it just said that he had misrepresented facts and so forth. It had no mention of the trial.

Q. But you thought that was a fact? In other words, those words that he has misrepresented, is a fact?

A. Yes, I read several articles. It wasn't just one.

Q. There wasn't any doubt in your mind that he had misrepresented from that article?

A. Well, after reading it about two or three times, as I said before, also while in New Orleans, I was employed by an employment service over there, and something over there that happened that made me believe I had been misled. I happened to mention the course to someone in the office and they told me at the time that they had read the article.

Q. Had read the same article?

A. Probably a previous article.

MR. JACKSON:

Does counsel for the Government have the FTC news release?

HEARING EXAMINER TOCKER:

You have that in already."

The Commission was forced to resort to such tactics because, from the commencement of its proceeding against petitioner, it had no substantial evidence of proof upon which to rely in the prosecution of its complaint and

proof of its allegations. The initial hearing was continued from December of 1960 until May 15, 1961, almost six months, when the Commission learned that petitioner was not going to enter into a consent decree. During that period, as reflected by the record, the Commission attempted to gain evidence and build its case against petitioner with the help of petitioner's competitor, Woolwine, supplying evidence and names of witnesses. To emphasize this point the transcript of the prehearing conference held on January 27, 1961, clearly reflects the dilemma in which the Commission found itself. Tr. p. 145, *et seq.*, and specifically starting at p. 149:

"MR. MIDDLETON:

"May I suggest the inquiries which I have directed to the potential witnesses in the field have not responded to me, at this point, your Honor - - - -

"HEARING EXAMINER JOHNSON:

"The only thing is, I think when I told you I was going to have a pre-hearing conference I did not want to have it until you were fully prepared until you have all the information on the case.

"MR. MIDDLETON:

"Mr. Examiner, I said - - - es, you said a prehearing.

"HEARING EXAMINER JOHNSON:

"Now, I specifically indicated, I specifically directed you to tell me a date when you were ready, the places you were to have witnesses, the names of those witnesses, and I did not want to have a pre-

hearing conference unless and until you were ready to give that information.

"Do you remember making that statement?

"MR. MIDDLETON:

"Do you remember my replies?

"HEARING EXAMINER JOHNSON:

"What was it?

"MR. MIDDLETON:

"I said there was a motion pending, that had been replied to by counsel supporting the complaint that there had been no order clarifying the issues under the order.

"HEARING EXAMINER JOHNSON:

"That wasn't involved in our conversation.

"MR. MIDDLETON:

"I mentioned it at our conversation, you remember that, sir?

"HEARING EXAMINER JOHNSON:

"I do not.

"MR. MIDDLETON:

"Well, it is - - - - -.

"HEARING EXAMINER JOHNSON:

"I find it necessary to have counsel go on record to make a reporting of it, so we will get the facts

in these cases, and I am asking on the record now specifically the names of such witnesses you know you have in New Orleans?"

and at page 156:

"HEARING EXAMINER JOHNSON:

"How about San Francisco?

"MR. MIDDLETON:

"There, I don't have a complete idea what is going on out there, because I don't have - - - at this point it's not my purpose to put on consumer testimony out there.

"I intend to use business and the respondent himself, and his officers, and government witnesses."

and at page 157:

"HEARING EXAMINER JOHNSON:

"At least that many. Now, when can you find out whether you'll know exactly what witnesses that you are going to use in the New Orleans area?

"MR. MIDDLETON:

"Well, first of all, of course, the ten witnesses I have a problem with because I haven't had response from - - -

"HEARING EXAMINER JOHNSON:

"When can you tell me? I am going to set this case, but I will not set it until I know what witnesses you are going to employ, the nature of their testimony, where they reside, and a general statement as to what type of testimony you ex-

pect them to give, because I'm not going to chase all over the country, spending an hour in one town, and then an hour in another town. I think they should all be brought into one place.

"MR. MIDDLETON:

"I think, of course, the Commission would have - - - I know, from my own standpoint, I have a different opinion on that.

"HEARING EXAMINER JOHNSON:

"You may have that opinion. But I'm telling you what I am going to require you to do.

"MR. MIDDLETON:

"Then, we may have - - - - -

"HEARING EXAMINER JOHNSON:

"You can take an appeal from my order; that's what I intend to order.

"MR. MIDDLETON:

"Okay, then, we can proceed when you have issued the order.

"HEARING EXAMINER JOHNSON:

"All right. I will tell you in that connection, it might be well in view of your statement that - - - Well, let's continue. San Francisco. What witnesses do you intend to use there?"

And at Tr. p. 182:

"HEARING EXAMINER JOHNSON:

"Under those circumstances, in view of the statements made by counsel for the respondent, would you be willing to supply this information voluntarily?

"I mean would you comply with the request of counsel of Mr. Jackson and Mr. Sapiro?

"MR. MIDDLETON:

"The problem is different with those gentlemen, in their furnishing me information.

"HEARING EXAMINER JOHNSON:

"Please answer my question?

"MR. MIDDLETON:

"I would not be.

"HEARING EXAMINER JOHNSON:

"You would not be willing?

"MR. MIDDLETON:

"Because the two situations are not - - -

"HEARING EXAMINER JOHNSON:

"You would not?

"MR. MIDDLETON:

"- - - situations are not comparable.

"HEARING EXAMINER JOHNSON:

"I'll state at this point on the record here that the Hearing Examiner will issue an order requiring—allowing the motion that not only the documents and the names of witesses and the like be supplied to Mr. Rushing, to counsel, but also to the counsel for the other respondent. And will set forth specifically the details of that order as far as time is concerned at a future date when I can ascertain where the witnesses are located.

"Now, I want to ask you a question, Mr. Middleton: When can you submit to me a list of the witnesses, their addresses, and a brief definite statement as to the type of testimony you intend them to present, and to the Hearing Examiner.

"I mean, I asked you when you can submit that to me on your own; when can you do that? Now, have in mind I don't intend to set this case for hearing until I have such a list in my possession of all the witnesses which you intend to employ.

"MR. MIDDLETON:

"Possibly in 30 days.

"HEARING EXAMINER JOHNSON:

"30 days?

"MR. MIDDLETON:

"Possibly.

"HEARING EXAMINER JOHNSON:

"Could you agree to furnish it to me within 30 days?

"MR. MIDDLETON:

"No, I think that's part of your order, is it not?

"HEARING EXAMINER JOHNSON:

"That's not part of my order. This will be taken care of later on. I am trying to schedule this case and find out where the witnesses are.

"MR. MIDDLETON:

"I told you where they are.

"HEARING EXAMINER JOHNSON:

"I want specifically the name of every witness, where they are located, their address, the nature of their testimony; of every witness.

"MR. MIDDLETON:

"This information could be turned over to the Hearing Examiner for his own personal use, but not for the public record.

"HEARING EXAMINER JOHNSON:

"All right, you will do that without—and you will have a right to take an appeal from the other order. You can take an appeal from this one. I am asking you whether or not you will give me such a list and at what time you can give me such a list?

"MR. MIDDLETON:

"Well, I say it will be about thirty days, I suppose.

"HEARING EXAMINER JOHNSON:

"Well, you agree to give it to me within thirty days? If it isn't thirty days, give me a definite date that you agree to give it to me, for my own use. I want to have it with a view to determining where we should have our hearings.

"MR. MIDDLETON:

"I'll have something to say where we have our hearings, Mr. Examiner.

"HEARING EXAMINER JOHNSON:

"You'll make recommendations.

"MR. MIDDLETON:

"Well, I think that we will determine that in some other way.

"HEARING EXAMINER JOHNSON:

"You mean you will determine that?

"MR. MIDDLETON:

"Someone will.

"HEARING EXAMINER JOHNSON:

"Yes, well the Hearing Examiner will determine where we are going to have hearings. And if you don't like it, you take an appeal from it, but I'll make the determination where the hearings will be held and you as a lawyer ought to know that I have that right, subject to your right to appeal.

"MR. MIDDLETON:

"That's true.

"HEARING EXAMINER JOHNSON:

"You recognize that fact?

"MR. MIDDLETON:

"I have an appeal, yes, sir.

"HEARING EXAMINER JOHNSON:

"Do you recognize that I have the right to fix the place of hearings?

"MR. MIDDLETON:

"I have an appeal from any order which you may make, sir.

"HEARING EXAMINER JOHNSON:

"Can you answer a simple question, please answer it?

"MR. MIDDLETON:

"Normally, it has been the policy with the Examiners that I have worked with, to hold the hearings at the convenience of the witnesses at the recommendation of counsel supporting the complaint.

"HEARING EXAMINER JOHNSON:

"And I know of some Examiners who are very much dissatisfied with the method.

"MR. MIDDLETON:

"Whether or not they are dissatisfied - - -

"HEARING EXAMINER JOHNSON:

"I do not intend to go through that type of procedure in spending half an hour or an hour in one town and then an hour in another town, where the witnesses can be brought into a central point."

The above, taken alone, is reprehensible, when the Commission had, itself, issued the complaint and thereafter, to act as prosecutor, judge and jury.

Taken with the fact that petitioner's business had, from its inception, in the fall of 1959, been subjected to thorough surveillance by the Federal Trade Commission, as well as the postal authorities (see Tr. pp. 1133, *et seq.*), with periodic reports being made thereon condemns the issuance of the complaint against petitioner as one being arbitrary, without rational basis and a capricious abuse of discretion. Attempt was made to bring all of these pertinent facts before the Commission without success. (RX 78, Tr. p. 1056.)

Nothing came before the Commission upon which it could base any findings or conclusions other than that which had already been made available to the Commission and the postal authorities prior to the filing of the Commission's complaint. This being so, the hearing and the evidence presented there were useless and the Government failed to prove its case against petitioner.

The Commission now seeks approval of its order, urging that it can add constructively, through its expert judgment in the field of trade, that evidence which has

not been provided and which is necessary to support its order.

An abstract purchasing public can not be supplied by the Government to take the place of actual testimony. The Commission refused to fully hear the testimony of Benjamin M. Klekner (Tr. pp. 1092, *et seq.*), an expert in the field, and failed to allow testimony from representatives of the Trade Commission and postal authorities.

All of the procedure, as outlined above, including investigation of petitioner, constitutes a violation of due process of petitioner's rights and the legislative standards validly set up have not been applied.

> *Exchange Commission v. Chenery Corp.*, 1943, 318 U. S. 80, 95, 63 S. Ct. 454, 462, 87 L. Ed. 626;
>
> *National Labor Relations Board v. Burns*, 207 F. (2d) 434.

The initial decision (Tr. p. 111) passes judgment upon quality and value of petitioner's course of instruction and study. (Tr. p. 114.)

The Commission is not expert in the field of education and is not endowed with any such authority to so pass judgment.

It has, therefore, no jurisdiction whatsoever to entertain the quality or worth of petitioner's course of study and instruction.

This course (RX 47, 48, 49 and 50) stands on its own merit and deserves a contrary finding than that of the initial decision even though the Commission, in fact, did have jurisdiction in this area.

The record taken as a whole can in no way support the Commission's findings and conclusions upon which the Commission justifies its order.

CONCLUSION

Petitioner prays that a writ of certiorari issue to review the judgment and orders of the United States Court of Appeals for the Fifth Circuit and that upon the granting of such writ the decisions of the Court below and the Federal Trade Commission be set aside and reversed, dismissing the complaint and proceedings against practitioner.

Respectfully submitted,

JOHN E. JACKSON, BALDWIN J. ALLEN & JOHN E. JACKSON, JR.,

Attorneys for Petitioner.

By

JOHN E. JACKSON, JR.

CERTIFICATE OF SERVICE

I, JOHN E. JACKSON, JR., one of the attorneys for petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the date shown below I served the foregoing petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit on Federal Trade Commission, Respondent, by mailing true copies thereof to:

MR. J. B. TRULY,
ASSISTANT GENERAL COUNSEL,
FEDERAL TRADE COMMISSION,
WASHINGTON 25, D. C.

Air Mail, Postage Prepaid.

NEW ORLEANS, LOUISIANA, DATED THIS

DAY OF NOVEMBER, 1963.

JOHN E. JACKSON, JR.,
Attorney for Petitioner.

1442 National Bank of Commerce Bldg.,
New Orleans, Louisiana, 70112.
Telephone: Area Code 504, 523-2522.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,439

GRADY L. RUSHING, an individual, doing business as MARCEL COMPANY,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review of an Order of the Federal Trade Commission.

Before RIVES, LEWIS* and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Grady L. Rushing, an individual, doing business as Marcel Company, for review of an order of the Federal Trade Commission in Docket No. 8138, and was argued by counsel.

*Of the Tenth Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, affirmed in its entirety and is ordered enforced.

July 10, 1963

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19,439

GRADY L. RUSHING, an individual, doing business as MARCEL COMPANY,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

Petition to Review an Order of the Federal Trade Commission (Louisiana Case).

(ON PETITION FOR REHEARING)

(August 29, 1963)

Before RIVES, LEWIS* and BELL, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is hereby DENIED.

*Of the Tenth Circuit, sitting by designation

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 651

GRADY L. RUSHING d b a MARCEL COMPANY,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

The judgment of the court of appeals was entered on July 10, 1963 (Pet. 53-54), and a petition for rehearing was denied on August 29, 1963 (Pet. 55). No extension of time for filing a petition for a writ of certiorari was sought or obtained. The petition was filed on November 30, 1963, which was 93 days after the court of appeals denied rehearing. The petition was thus untimely filed. 28 U.S.C. 2101(c).

In any event, the petition presents no issue warranting review by this Court. The Federal Trade Commission found that petitioner had made a number of misrepresentations in operating a correspondence school which purports to prepare persons to pass United States Civil Service examinations, and entered a cease-and-desist order. The court of appeals, upon reviewing the evidence, concluded that it is "more than adequate to sustain the Commission's determination that this enterprise was badly in need of regulatory restraint," and held that the Commission's findings are "well supported by the evidence" (Appendix, *infra*, pp. 6, 9).[1] The lengthy petition basically challenges only the sufficiency of the evidence, and there is no occasion for further review of that factual issue.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1963.

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[1] Since the petition does not include the opinion of the court of appeals, we have appended it. It is reported at 320 F. 2d 280.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19439

GRADY L. RUSHING, an individual doing business as MARCEL COMPANY, PETITIONER

versus

FEDERAL TRADE COMMISSION, RESPONDENT

Petition to Review an Order of the Federal Trade Commission (Louisiana Case).

(July 10, 1963.)

Before RIVES, LEWIS* and BELL, Circuit Judges.

LEWIS, Circuit Judge: Petitioner is engaged in a correspondence school business aimed at procuring and charging students for a course of study and instruction purporting to prepare purchasers thereof

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* Of the Tenth Circuit, sitting by designation.

for United States Civil Service examinations. He here seeks review of an order of the Federal Trade Commission requiring him to cease making certain designated representations in the promotion of the business which were found by the Commission to be unfair and deceptive practices and thus violative of the Federal Trade Commission Act, 15 U.S.C.A. 45. The order was entered after an extensive and prolonged hearing relating to petitioner's business practices and requires petitioner to cease and desist from representing, directly or by implication that:

1. Civil Service examinations for particular positions described orally or in any writing have been announced or are about to be given in or for any geographical or United States Civil Service area unless such examinations actually have been announced or are about to be given in or for such area and adequate time remains for the filing of applications to participate in such examinations.
2. The completion of any series of materials or course of instruction offered by the respondent in commerce will enable a person to pass the Civil Service examination for the position selected by such person.
3. Respondent's materials or course of instruction provide training for Civil Service positions.
4. Persons solicited to purchase respondent's materials or course of instruction are examined or screened as to their possession of qualifications for positions to be sought before they are permitted to purchase such materials or course.
5. Respondent will continue to train or instruct persons who have completed a purchased series

of materials or course of instruction until they are appointed to a Civil Service position or misrepresenting in any manner the extent or nature of instruction that he gives to purchasers.

6. Representing, directly or by implication:
   (a) That purchasers of respondent's materials or course will be notified when or where examinations will be held;
   (b) That persons completing said materials or course of instruction and passing a Civil Service examination are assured of or will obtain Civil Service positions; or
   (c) That respondent or his agents or representatives are connected with the United States Civil Service Commission or any branch thereof or any other agency of the United States Government.
7. Using any document that simulates a court process in connection with the collection of accounts from debtors; or using any other document or practice which may suggest or imply that a debtor is being sued when such is not the fact.

Upon appeal, and against a background of 1241 pages of printed record, petitioner now contests the validity of the order but with such generalization that appellate review of particularized claims of error is impossible. However, petitioner asserts broadly that the evidence is insufficient to support the Commission's findings, that the Commission has attempted

[1] Although this procedure does not fulfill the requirements of Rule 21(2)(a) of this Court we have reviewed the entire record for error in recognition of the impact of the Commission order upon petitioner.

to judge the value of petitioner's course of study, and that the entire administrative process is so contaminated with prejudice and abuse as to constitute a denial of due process.

The evidence is more than adequate to sustain the Commission's determination that this enterprise was badly in need of regulatory restraint. In advertisements and brochures, petitioner solicited contact with persons desiring civil service employment by extolling the good salaries and employment benefits with enthusiasms such as:

> "GET A CIVIL SERVICE JOB. Train now, Exams coming up. . . ."
>
> "Now is the most opportune time to start preparing for Civil Service position. Written examinations will be held for many permanent Civil Service Jobs. . . ."
>
> "THE BEST WAY TO GET AN APPOINTMENT IS TO PREPARE WITH OUR TRAINING SERVICE AND STAND AMONG THE HIGHEST ON THE GOVERNMENT EXAMINATION."
>
> "Whichever job you pick, we will coach you for it successfully. . . ."
>
> ". . . A personal appointment is necessary to determine your qualifications. If you qualify, you will be accepted for training. . . ."
>
> ". . . Check two or three positions before he (our field counsellor) calls. He will let you know whether or not you can qualify."

The hearing examiner found that the implications of such advertisements were false and misleading in that civil service examinations for many of the positions described had not been announced in areas

where the solicitation was made; that completion of the petitioner's course would not assure the applicant of being able to pass the examination; that the training offered was in most instances general and would not provide training for a particular position; and that the salesmen for petitioner were not informed as to the qualifications necessary for a particular position and were unable to make a proper evaluation of qualifications.

The application for instruction signed by the prospective subscriber stated:

> "Should I fail to pass the first examination taken, I am to receive, without further payment, training until I RECEIVE MY APPOINTMENT."

The trial examiner found this statement to contain a deceptive implication.

Salesmen were employed by petitioner to follow "leads" gained from responses to advertisements and were encouraged to press home sales of the courses with the vigor of the traditional "hard sell." The

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[2] Examples from Marcel's bulletins to salesmen:

> "Every person you see will give you excuses as to why they 'Can't act now.' . . . Protect yourself against excuses *BEFORE* you get them. . . If you told them *BEFORE* they could even give you a single one, that your job is to cull or weed out curiosity seeds, fly-by-niter, nosey people, sightseers, lazy people, non-ambitious people, people trying to find an excuse to keep from improving themselves, people with no feeling for their family, and their future, people that want time to think it over, . . . people who don't make much effort to get the money. Tell them this *BEFORE* they can give you ANY excuse. . . ."
>
> ". . . Be a good talker when it is your turn. . . Be sure you don't *DRIFT* from your 'pitch'. Be sure you don't let them in the drivers seat. Be sure you keep control at all times. Be sure you are watching the faces of all. . ."

hearing examiner held that the petitioner was bound by the representations of its salesmen and that the salesmen led their contacts to believe without foundation that they would be notified of times and places where examinations were to be given, that they would be specially trained for the positions selected by them, that persons completing the courses and passing the examination were assured of obtaining positions, and that the petitioner and his sales people were connected with the United States Civil Service Commission.

Finally, to enforce payment under the contract when a purchaser defaulted on his time payments, respondent has used forms simulating legal pleadings and has threatened garnishment, although no court action was brought. For example:

"FINAL NOTICE before GARNISHMENT

WE ARE GIVING YOU 48 HOURS TO MAKE A PAYMENT ON YOUR ACCOUNT. OTHERWISE WE SHALL BE FORCED TO COLLECT OUR MONIES THRU GARNISHMENT OF YOUR WAGES.

MARCEL CO."

Witnesses who had become interested in taking the course testified as to representations by salesmen that they would never be out of work after studying the lessons sent by Marcel, that they believed Marcel's representatives to be representatives of the United States Government, that they were not allowed to read the contract before signing it, that they were guaranteed jobs, that they were qualified despite very limited previous educations and that they were threatened with legal proceedings when they fell behind in their payments.

One witness who was unable to read the contract by reason of lack of elementary education signed it

but was unable to complete the lessons sent through the mail to him. Other witnesses understood that they would be able to cancel their contracts within a limited period of time but when they attempted to do so were brusquely dismissed. Some never received the lessons for which they had paid.

Since the factual findings of the Commission are well supported by the evidence they are conclusive as a basis for review, 15 U.S.C.A. 45(c), as are the permissible inferences to be drawn from the facts. *Keele Hair and Scalp Specialists, Inc. v. Federal Trade Commission*, 5 Cir., 275 F. 2d 18.

We find no basis for petitioner's complaint that the Commission's order is jurisdictionally excessive as constituting a judgment upon the value of petitioner's course of study. An understanding of petitioner's materials was, of course, necessary to a determination of the case and in this regard the trial examiner stated:

> "The quality of the materials has not been made the subject of critical testimony or evaluation. A cursory examination of them persuades me to the conclusion, having in mind the testimony of the Commission's witness, an official of the United States Civil Service Commission, that the material could be of help to persons preparing to take Civil Service examinations. Although I make this observation, I do not find that the material does, in fact, prepare anybody to take and pass an examination or to qualify for a position."

The substance of the Commission's decision is not that petitioner's product was without value but that his representations far exceeded the potential of his material.

Finally, petitioner attacks the entire administrative process of the Commission by pointing to such facts as: credibility was given each of the Commission's witnesses; petitioner was charged with violations even though he gave full cooperation to investigators; and the original trial examiner assigned to the case and who indicated dissatisfaction with Commission counsel during prehearing procedures was succeeded at the hearing by another examiner. Sufficient it is to say that the credibility of witnesses is the responsibility of the fact finder and that cooperation is no guarantee of forgiveness for violations of law. However we do note that the arrogant impertinence of the Commission's trial counsel before the original trial examiner does little to inspire confidence in the administrative process.

The order of the Commission is affirmed in its entirety and is ordered enforced.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1963 715984 846